

A Aziz bin Muhamad Din v Public Prosecutor

HIGH COURT (MELAKA) — CRIMINAL APPEAL NO 42-4-1996
AUGUSTINE PAUL JC
2 SEPTEMBER 1996

B *Evidence — Corroboration — Sexual offence — Rape — Whether corroboration required as a matter of law — Requirement of corroboration warning*

Evidence — Corroboration — Rape — Statutory rape — Situation where consent irrelevant — Medical evidence at variance with each other — Whether medical evidence sufficient to corroborate evidence of victim on factum of rape

C *Evidence — Corroboration — Whether statement emanating from witness herself may be used as corroboration — Whether corroborative evidence must be independent — Whether there was a conflict between ss 73A(7) and 157 of the Evidence Act 1950 — Evidence Act 1950 ss73A (7) & 157*

D *Evidence — Statement — Statement of rape victim — Whether there is a distinction between statement and complaint of rape victim — Whether complaint relevant under s 8 illustration (j) of the Evidence Act 1950*

Evidence — Confession — Voluntariness — Inducement, threat or promise — Whether advice to admit to the charge given by the father to the accused in the presence of the arresting officers would taint a confession — Criminal Procedure Code (FMS Cap 6) s 113

Criminal Procedure — Trial — Trial within a trial — Cautioned statement — Voluntariness — Prosecution to bear burden of proving voluntariness of statement

F The accused was charged and convicted under s 376 of the Penal Code (FMS Cap 45) for rape of an underaged girl on 31 January 1995 at a flat in Melaka. The prosecution's case rested primarily on the medical evidence and testimony of the complainant ('SP2'), father of the complainant ('SP1') and the owner of the flat ('SP6').

G SP6 had stated in evidence that both SP2 and the accused had spent the night at his house on the date the alleged rape took place. There was also reliance on the cautioned statement made by the accused after being advised by his father in the presence of the arresting officers to admit to the charge. The medical evidence tendered by the two medical doctors (SP5 and SP9) had been at variance as to the age of the tear to the hymen. However, the learned sessions court judge had concluded with reference to the testimony of SP2, that there had been penetration. The learned sessions court judge had also admitted the police report ('exh P1') made by SP1 which was based on what SP2 had told him and the cautioned statement by the accused. The accused appealed and the issues for consideration were as follows: (i) whether corroboration in cases involving sexual offences was required as a matter of law; (ii) whether the testimony of SP5 and SP9 in relation to the medical evidence was sufficient to amount to corroboration; (iii) whether the police report made by SP1 based on what SP2 told him could amount to corroboration; (iv) whether

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the evidence of SP1 based on what SP2 told him could amount to corroboration; (v) whether there was evidence that there was sexual intercourse between SP2 and the accused based on the fact that SP2 and the accused had spent the night in the house belonging to SP6, or whether that fact constituted mere opportunity for sexual intercourse to have taken place; (vi) the burden of proof in a trial within a trial; and (vii) whether the cautioned statement by the accused was voluntarily made.

Held, allowing the appeal:

- (1) In a case involving a sexual offence a conviction based on uncorroborated evidence is not illegal — but the rule of practice regulates the manner in which uncorroborated evidence is to be treated, that is to say, the judge must warn himself of the dangers of convicting on such evidence (see p 485G–H). In relation to the corroboration warning, it must appear in the judgment or grounds of decision of the trial court, though no particular form of words need be used (see pp 485I–486B); *Ng Yau Thai v PP* [1987] 2 MLJ 214 and *Chiu Nang Hong v PP* [1965] 1 MLJ 40 followed.
- (2) The evidence adduced by SP6 stopped short at proof of opportunity. The evidence of opportunity should be supplemented by proof of circumstances of such a nature ‘to lead to the inference that it was probable that advantage would be taken of the opportunity’. Admissible medical evidence which corroborated the evidence of the complainant would have constituted such supplementary evidence. However in the circumstances the only available evidence was that of the mere opportunity which could not amount to corroboration of the evidence of SP2 (see pp 495I–496D); *Ridley v Whipples* (1916) 22 CLR 381 followed.
- (3) Since the case was based statutory rape, consent is irrelevant. Therefore, medical evidence showing any fresh tear to the hymen is sufficient to corroborate the evidence of the victim on the factum of rape. The evidence of SP5 and SP9 in relation to the medical report as to the age of the tear was at variance with each other. In the circumstances therefore, to conclude that the tear was caused by the act of the accused is not sustainable in law (see pp 486H–487G); *Syed Abu Tahir all Mohamed Esmail v PP* [1988] 3 MLJ 485, *Din v PP* [1964] MLJ 300 and *R v Kerim* [1988] 1 Qd R 426 followed.
- (4) Section 73A(7) of the Act has a direct bearing on the evidence rendered admissible by s 157. Both the sections cannot be harmoniously interpreted and in the light of the rules of construction, s 73A(7) must prevail. Thus a statement rendered admissible by s 157 cannot be treated as corroboration of evidence given by the maker of the statement (see p 491D). The evidence of SP1 and exh P1 based on the statement made by SP2 therefore

- A is incapable of amounting to corroborative evidence to support SP2 because SP2 cannot corroborate herself (see pp 491E–492C); *Re Tan Keng Tin* [1932] MLJ 134, *Foo Loke Ying & Anor v Television Broadcasts Ltd & Ors* [1985] 2 MLJ 35, *Lim Phin Khian v Kho Su Ming* [1996] 1 MLJ 1, *Cooper Brookes (Wollongong) Pty Ltd v FCT* (1981) 35 ALR 151, *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor* [1995] 1 MLJ 719, *Ocean Road Motel Pty Ltd v Pacific Acceptance Corp Ltd* (1963) 109 CLR 276 and *The Dean, etc of Ely v Bliss* (1842) 11 LJ Ch 351 followed.
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- C (5) A complaint made by a rape victim and the circumstances under which it was made are relevant under s 8 illustration (j) of the Act. The illustration makes a distinction between a complaint and a statement. While a statement is made relevant only as corroborative evidence under s 157 of the Act, with regard to a complaint, illustration (j) demonstrates that the fact of the complaint having been made, the circumstances under which, and the terms in which it was made are relevant. It forms part of the *res gestae* principle under s 6 of the Act and will therefore not be hit by the prohibition contained in s 73A(7). As to whether the words uttered by SP2 to her father amounted to a complaint, the evidence of SP1 and SP2 revealed that SP2 made the statement only after repeated questioning by SP1 and that too, only on 3 February 1995 at the Health Clinic after which the police report was made. The statement which had only revealed that SP2 had spent the night at SP6's house did not relate to the crime for which the accused had been charged and, in any event, was not made voluntarily and spontaneously. The burden of proof was on the prosecution to establish that the statement amounted to a complaint within the meaning of s 8 of the Act. This, the prosecution failed to do (see pp 493B–494G).
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- G (6) In raising the issue of voluntariness of a cautioned statement, there is no onus on the accused to show involuntariness. The burden is on the prosecution to prove beyond any reasonable doubt that the confession was voluntary (see p 497E–H); *Hasibullah bin Mohd Ghazali v PP* [1993] 3 MLJ 321; *Ibrahim v R* [1914] AC 599; *PP v Chong Boo See* [1988] 1 CLJ 679 followed.
- H (7) In order to attract the prohibition contained in s 113 of the Criminal Procedure Code (FMS Cap 6) the threat, inducement or promise must have been made by a person in authority, giving rise to a decision by the accused actuated by fear of prejudice or hope of reward. The accused person's cautioned statement in this case was not given under oppressive circumstances and it was properly recorded, not as a result of cross-examination by the recording officer (see pp 504B–C, 506G–H, 507F). However the advice to admit, made by the accused person's father to the accused, was in the presence of the arresting officers. In such a
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situation, a person not in authority can be considered as the agent of the person in authority or said to be clothed with that authority. The fact that the words used were advisory in nature does not weaken their effect as even the most gentle threat would taint a confession. The cautioned statement was thus not voluntarily made and it should be excluded (see pp 509H-510F); *Re Lee Kim Ching* [1974] 2 MLJ 44, *R v Cleary* (1963) 48 Cr App R 116 and *R v AB* (1986) 26 CCC (3d) 17 followed.

[Bahasa Malaysia summary]

Tertuduh telah dituduh dan disabit di bawah s 376 Kanun Keseksaan (NMB Bab 45) kerana merogol seorang gadis bawah umur pada 31 Januari 1995 di sebuah rumah pangsa di Melaka. Kes pendakwa pada asasnya adalah berdasarkan sokongan keterangan perubatan dan keterangan pengadu ('SP2'), bapa pengadu ('SP1') dan tuanpunya rumah pangsa ('SP6'). SP6 telah menyatakan dalam keterangannya bahawa kedua-dua SP2 dan tertuduh telah bermalam di rumahnya pada tarikh rogol tersebut berlaku. Pihak pendakwa juga telah bergantung kepada pernyataan beramaran yang dibuat oleh tertuduh selepas dinasihati oleh bapanya, di hadapan pegawai penangkapan untuk mengakui tuduhan itu. Keterangan perubatan yang dikemukakan oleh dua orang doktor perubatan (SP5 dan SP9) mengenai usia koyakan selaput dara itu adalah bercanggah. Akan tetapi hakim mahkamah sesyen yang bijaksana telah memutuskan dengan merujuk kepada keterangan SP2, bahawa terdapatnya satu kemasukan. Hakim mahkamah sesyen yang bijaksana juga telah menerima laporan polis ('eks P1') yang dibuat oleh SP1 berdasarkan apa yang disebut oleh SP2 dan pernyataan beramaran oleh tertuduh. Tertuduh telah merayu dan isu-isu untuk dipertimbangkan adalah seperti berikut: (i) sama ada sokongan dalam kes-kes yang melibatkan kesalahan seks adalah diperlukan dari segi undang-undang; (ii) sama ada keterangan SP5 dan SP9 berkaitan dengan laporan perubatan adalah mencukupi sebagai sokongan; (iii) sama ada laporan polis yang dibuat oleh SP1 berdasarkan apa yang dikatakan oleh SP2 boleh terjumlah kepada sokongan; (iv) sama ada keterangan SP1 berdasarkan apa yang diberitahunya oleh SP2 boleh terjumlah kepada sokongan; (v) sama ada terdapatnya keterangan yang menunjukkan bahawa hubungan seks telah berlaku di antara SP2 dan tertuduh berdasarkan fakta bahawa SP2 dan tertuduh telah bermalam di rumah yang dipunyai oleh SP6, ataupun sama ada fakta tersebut hanya menunjukkan bahawa terdapatnya peluang sahaja untuk melakukan hubungan seks; (vi) beban bukti dalam perbicaraan dalam suatu perbicaraan; dan (vii) sama ada pernyataan beramaran oleh tertuduh telah dibuat secara sukarela.

Diputuskan, membenarkan rayuan:

- (1) Dalam kes yang membabitkan kesalahan seks, suatu sabitan berdasarkan keterangan yang tidak disokong adalah tidak salah

- A dari segi undang-undang — tetapi ianya adalah kaedah amalan yang menentukan cara bagaimana keterangan yang tidak disokong harus dikendalikan, iaitu, hakim harus memberi amaran kepada dirinya sendiri akan bahayanya sabitan berdasarkan keterangan tersebut (lihat ms 485G–H). Berkenaan dengan amaran sokongan,
- B ianya mestilah kelihatan dalam penghakiman ataupun alasan penghakiman mahkamah perbicaraan walaupun tidak perlunya menggunakan perkataan-perkataan yang tertentu (lihat ms 485I–486B); *Ng Yau Thai v PP* [1987] 2 MLJ 214 dan *Chiu Nang Hong v PP* [1965] 1 MLJ 40 diikuti.
- C (2) Keterangan yang dikemukakan oleh SP6 merupakan keterangan yang menunjukkan bahawa terdapatnya peluang sahaja. Keterangan yang menunjukkan peluang ini haruslah dilanjutkan dengan bukti keadaan yang akan ‘menunjukkan bahawa kebarangkaliannya kesempatan telah diambil oleh peluang tersebut’. Keterangan perubatan yang boleh diterimamasuk yang akan menyokong keterangan pengadu sepatutlah dijadikan bukti lanjutan tersebut. Akan tetapi dalam keadaan ini, bukti yang terdapat hanyalah keterangan yang menunjukkan peluang sahaja yang tidak terjumlah kepada sokongan keterangan SP2 (lihat ms 495I–496D); *Ridley v Whipps* (1916) 22 CLR 381 diikuti.
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- E (3) Oleh kerana kes ini adalah berdasarkan tuduhan rogol statutori, kerelaan adalah tidak relevan. Maka keterangan perubatan yang menunjukkan koyakan baru pada selaput dara adalah mencukupi untuk menyokong keterangan mangsa itu atas faktum rogol. Keterangan SP5 dan SP9 mengenai usia sebenar koyakan itu adalah bercanggah. Dalam keadaan demikian, kesimpulan bahawa koyakan itu disebabkan oleh tindakan tertuduh, tidak dapat disokong dari segi undang-undang (lihat ms 486H–487G); *Syed Abu Tahir all Mohamed Esmail v PP* [1988] 3 MLJ 485, *Din v PP* [1964] MLJ 300 dan *R v Kerim* [1988] 1 Qd R 426 diikuti.
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- G (4) Seksyen 73A(7) Akta tersebut mempunyai kesan langsung terhadap keterangan yang dianggap boleh diterimamasuk oleh s 157. Kedua-dua seksyen tidak dapat ditafsirkan dengan selarasnya dan berdasarkan kaedah-kaedah tafsiran, s 73A(7) patut mengatasi. Maka suatu pernyataan yang dianggap boleh diterimamasuk oleh s 157 tidak boleh terjumlah kepada sokongan keterangan yang diberi oleh orang yang membuat pernyataan tersebut (lihat ms 491D). Maka keterangan oleh SP1 dan eks P1 berdasarkan kenyataan yang dibuat oleh SP2 tidak boleh terjumlah kepada keterangan sokongan kerana SP2 tidak boleh menyokong dirinya sendiri (lihat ms 491E–492C); *Re Tan Keng Tin* [1932] MLJ 134, *Foo Loke Ying & Anor v Television Broadcasts Ltd & Ors* [1985] 2 MLJ 35, *Lim Phin Khian v Kho Su Ming* [1996] 1 MLJ 1, *Cooper Brookes (Wollongong) Pty Ltd v FCT* (1981) 35 ALR 151, *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor* [1995] 1 MLJ 719, *Ocean Road Motel Pty Ltd v Pacific Acceptance Corp Ltd* (1963) 109 CLR 276 dan *The Dean, etc of Ely v Bliss* (1842) 11 LJ Ch 351 diikuti.
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- (5) Aduan yang dibuat oleh seorang mangsa rogol dan keadaan di bawah mana ianya telah dibuat adalah relevan di bawah s 8 contoh (j) Akta tersebut. Contoh tersebut membezakan di antara aduan dengan sesuatu kenyataan. Sesuatu kenyataan itu adalah relevan hanya sebagai keterangan sokongan di bawah s 157 Akta tersebut manakala berkenaan dengan sesuatu aduan, contoh (j) menunjukkan fakta bahawa ketika aduan telah dibuat, keadaan di bawah mana, dan cara ianya dibuat adalah relevan. Ianya merupakan sebahagian dari prinsip *res gestae* di bawah s 6 Akta tersebut dan oleh itu ianya tidak akan dibataskan oleh peruntukan s 73A(7). Berkenaan dengan sama ada perkataan-perkataan yang disebutkan oleh SP2 kepada ayahnya terjumlah kepada suatu aduan, keterangan SP1 dan SP2 menunjukkan bahawa SP2 telah membuat kenyataan tersebut hanya setelah disoal berkali-kali oleh SP1 dan itu juga, hanya pada 3 Februari 1995 di Klinik Kesihatan setelah mana laporan polis dibuat. Kenyataan yang hanya menunjukkan bahawa SP2 telah bermalam di rumah SP6 adalah tidak berkenaan dengan kesalahan yang mana tertuduh telah dituduh dan, walaupun bagaimanapun, ianya tidak dibuat secara sukarela dan spontan. Beban bukti adalah atas pihak pendakwa untuk membuktikan bahawa kenyataan tersebut terjumlah kepada aduan yang termasuk dalam makna s 8 Akta tersebut. Pihak pendakwa telah gagal berbuat demikian (lihat ms 493B–494G). A
- (6) Dalam membangkitkan isu kesukarelaan membuat pernyataan, tidak ada beban atas tertuduh untuk menunjukkan ketidak sukarelaan. Beban adalah di atas pendakwa untuk menunjukkan tanpa keraguan yang munasabah bahawa pengakuan salah itu dibuat secara sukarela (lihat ms 497E–H); *Hasibullah bin Mohd Ghazali v PP* [1993] 3 MLJ 321, *Ibrahim v R* [1914] AC 599 dan *PP v Chong Boo See* [1988] 1 CLJ 679 diikuti. B
- (7) Demi pemakaian larangan yang terdapat di dalam s 113 Kanun Acara Jenayah (NMB Bab 6) ancaman, dorongan, atau janji mesti dibuat oleh seseorang yang berkuasa, yang menimbulkan keputusan oleh tertuduh yang dipengaruhi oleh ketakutan prejudis ataupun harapan ganjaran. Dalam kes ini, pernyataan beramaran yang dibuat oleh tertuduh tidak dibuat di bawah keadaan yang menyusahkan dan ianya telah direkodkan dengan sewajarnya, dan bukannya hasil soal-balas dari pegawai rekod (lihat ms 504B–C, 506G–H, 507F). Walaupun bagaimanapun, kenyataan yang dibuat dalam bentuk nasihat oleh ayah tertuduh kepada tertuduh untuk mengaku, telah dibuat di hadapan pegawai penangkapan. Dalam keadaan sedemikian, seseorang yang tidak berkuasa boleh dikatakan sebagai agen orang yang berkuasa itu ataupun diselamatkan dengan kuasa itu. Fakta bahawa perkataan-perkataan yang digunakan adalah dalam bentuk nasihat tidak melemahkan kesan kenyataan itu kerana ancaman yang paling lembut pun akan mencemarkan satu pengakuan salah. Maka pengakuan salah tersebut tidak dibuat secara sukarela dan harus diketepikan (lihat ms 509H–510F); *Re Lee Kim Ching* [1974] 2 MLJ 44, *R v Cleary* C
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- A (1963) 48 Cr App Rep 116 dan *R v AB* (1986) 26 CCC (3d) 17 diikut).]

Notes

- B For a case on corroboration in cases involving sexual offences, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue), para 618.
For a case on medical evidence in cases involving sexual offences, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue), para 604.
For cases on corroboration emanating from witnesses themselves, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue), paras 594–601.
C For cases on voluntariness of a confession, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue), paras 501–503.

Cases referred to

- Ah Mee v PP* [1967] 1 MLJ 220
Alcontara all Ambross Anthony v PP [1996] 1 MLJ 209
D *Boudreau v The King* (1949) 93 CCC 55
Brabakaran v PP [1966] 1 MLJ 64
Callis v Gunn [1964] 1 QB 495
Chiu Nang Hong v PP [1965] 1 MLJ 40
Collins v R (1980) 31 ALR 257
E *Cooper Brookes (Wollongong) Pty Ltd v FCT* (1981) 35 ALR 151
Cracknell v Smith [1960] 1 WLR 1239
DPP v Hester [1973] AC 296
DPP v Kilbourne [1973] 1 All ER 440
DPP v Ping Lin [1976] AC 574
Dato Mokhtar bin Hashim v PP [1983] 2 MLJ 232
F *Datuk Haji Harun bin Haji Idris v PP* [1977] 2 MLJ 155
Dawson v M'Kenzie (1908) SC 698
Dean etc of Ely, The v Bliss (1842) 11 LJ Ch 351
Din v PP [1964] MLJ 300
Doney v R (1990) 171 CLR 207
G *Foo Loke Ying & Anor v Television Broadcasts Ltd & Ors* [1985] 2 MLJ 35
Hasibullah bin Mohd Ghazali v PP [1993] 3 MLJ 321
Hong Leong Equipment Sdn Bhd v Liew Fook Chuan [1996] 1 MLJ 481
Ibrahim v R [1914] AC 599
H *James v R* (1971) 55 Cr App Rep 299
Karthiyayani & Anor v Lee Leong Sin & Anor [1975] 1 MLJ 119
Lau Kee Hoo v PP [1984] 1 MLJ 110
Lee Kim Ching, Re [1974] 2 MLJ 44
Lee Weng Sang v PP [1978] 1 MLJ 168
I *Lim Baba v PP* [1962] MLJ 201
Lim Kim Tjok v PP [1978] 2 MLJ 94
Lim Phin Khian v Kho Su Ming [1996] 1 MLJ 1
Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor [1995] 1 MLJ 719
Mohamed Ali v PP [1962] MLJ 230

- Ng Yau Thai v PP* [1987] 2 MLJ 214 A
Noor Mohamed v R [1949] AC 182
Ocean Road Motel Pty Ltd v Pacific Acceptance Corp Ltd (1963) 109 CLR 276
Ong Hock & Anor v R [1939] MLJ 232
PP v Abdul Rahman bin Ibrahim (Criminal Trial No 47(58)-15-86, High Court, Penang) B
PP v Aris bin Yunus [1989] 1 CLJ 239
PP v Chan Choon Keong & Ors [1989] 2 MLJ 427
PP v Chee Kon Fatt [1991] 3 CLJ 2564
PP v Chong Boo See [1988] 1 CLJ 679
PP v Emran bin Nasir [1987] 1 MLJ 166 C
PP v Kamde bin Raspani [1988] 3 MLJ 289
PP v Ku Hang Chua [1975] 2 MLJ 99
PP v Law Say Seck & Ors [1971] 1 MLJ 199
PP v Lee Chee Meng [1991] 1 MLJ 227
PP v Liik Ching Kwong [1988] 1 MLJ 398 D
PP v Mohamed bin Majid [1977] 1 MLJ 121
PP v Mohd Fuzi bin Wan Teh & Anor [1989] 2 CLJ 652
PP v Naikan [1961] MLJ 147
PP v Paneerselvan & Ors [1991] 1 MLJ 106
PP v Ramasamy [1991] 1 MLJ 75
PP v Teh Lye Tong (1964) 3 MC 208 E
PP v Teo Eng Chan & Ors [1988] 1 MLJ 156
PP v Veeran Kutty & Anor [1990] 3 MLJ 498
PP v Yong Kong Hin [1981] 2 CLJ 178
Perpetual Executors and Trustees Assoc of Australia Ltd v FCT (1948) 77 CLR 1
Pyare Lal v State of Rajasthan AIR 1963 SC 1094 F
R v AB (1986) 26 CC (3d) 17
R v Arthur Fernando (1940) 42 NLR 76
R v Barker (1941) 38 Cr App Rep 52
R v Baskerville [1916] 2 KB 658
R v Blackburn (1852) 6 Cox CC 333 G
R v Bodsworth (1968) NSW 123
R v Brophy [1981] 2 All ER 705
R v Cleary (1963) 48 Cr App Rep 116
R v Coley (1868) 10 Cox CC 536
R v Court (1836) 7 C & P 486
R v Cummings [1948] 1 All ER Rep 551 H
R v Donat (1985) 82 Cr App Rep 173
R v Fennell (1881) 7 QBD 147
R v Gillis (1866) 11 Cox CC 69
R v Kerim [1988] 1 Qd R 426
R v Kingston (1830) 4 C & P 387
R v Koh Soon Poh [1935] MLJ 120 I
R v Lillyman [1896] 2 QB 167
R v Luckhurst (1853) 23 LJMC 18
R v Osborne [1905] 1 KB 551
R v Priestley (1966) 50 Cr App Rep 183

- A *R v Reason* (1872) 12 Cox CC 228
R v Reeve and Hancock (1872) LR 1 CCR 362
R v Richards (1832) 5 C & P 318
R v Sleeman (1853) 6 Cox CC 245
R v Smith (1959) 43 Cr App Rep 121
- B *R v Thomas* (1836) 7 C & P 345
R v Thompson (1783) 1 Leach 291
R v Tripodi [1961] VR 186
R v Velayuthan [1935] MLJ 277
R v West (1983) 79 Cr App Rep 45
R v Whitehead [1929] 1 KB 99
- C *Refrigerated Express Lines (A' Asia) Pty Ltd v Australian Meat & Live-stock Corp* (1980) 29 ALR 333
Ridley v Whipps (1916) 22 CLR 381
Rohana bte Ariffin v Universiti Sains Malaysia [1989] 1 MLJ 487
S v T (1963) 1 SA 484 (AD)
Selvadurai v PP [1948-49] MLJ Supp 43
- D *Syed Abu Tahir a/l Mohamed Esmail v PP* [1988] 3 MLJ 485
TN Nathan v PP [1978] 1 MLJ 134
Tan Keng Tin & Anor, Re [1932] MLJ 134
Tan Too Kia v PP [1980] 2 MLJ 187
Thomas v Jones [1921] 1 KB 22
- E *Vadivelu Thevar v State of Madras* AIR 1957 SC 614
Wong Kam-ming v R [1979] 1 All ER 939
Wong Sieng Ping v PP [1967] 1 MLJ 56
Wong Thin Yit v Mohamed Ali [1971] 2 MLJ 175
Woolmington v DPP [1939] AC 462
- F *Yap Ee Kong & Anor v PP* [1981] 1 MLJ 144

Legislation referred to

Criminal Procedure Code (FMS Cap 6) s 113
 Evidence Act 1950 ss 8, 73A(7), 157
 Penal Code (FMS Cap 45) s 376

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Teoh Kim Hong (Mohd Latip & Associates) for the appellant.
Anslem Charles Fernandez (Deputy Public Prosecutor) for the Public Prosecutor.

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Augustine Paul JC: The charge preferred against the accused in the Sessions Court at Melaka is as follows:

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Bahawa kamu pada 31 Januari 1995, lebih kurang 10.30 malam, di dalam rumah No 13-2-1 Rumah Pangsa JKR 4317 Jalan Cheng, dalam Daerah Melaka Tengah di dalam Negeri Melaka, telah merogol seorang perempuan Melayu bernama Siti Aishah bte Mohamed Mohee berumur 15 tahun 6 bulan, oleh itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah s 376 Kanun Keseksaan (NMB Bab 45).

The accused claimed trial to the charge. The prosecution's case rested on the evidence of ten witnesses. When the defence was called the accused elected to give evidence on oath. He did not call any other witness. The

accused was then found guilty and convicted and was sentenced to five years' imprisonment. This appeal is by him against the conviction and sentence.

The victim of the alleged rape is SP2. She met the accused a week prior to 31 January 1995. On that day the accused took her to the house of one Suhaimi ('SP6'). SP6 left them in his house and went to the hospital where his wife had been admitted. He came back the following morning and found them still there. SP6 confirmed this in his evidence. SP2 said that the accused had sexual intercourse with her after they had been in the house for sometime. She said that he took out his penis when she had complained to him of pain. From her evidence it is clear that she consented to the act of sexual intercourse. She returned home on 1 February 1995 at 11.35am. Her father, SP1, queried her whereabouts. Her response, as testified by her, was as follows:

Bila bapa bawa saya balik ke rumah, ayah saya tanya ke mana saya pergi dan dengan siapa saya keluar. Mula-mula saya tidak jawab pertanyaan bapa saya. Bila ayah saya mendesak, saya baru saja jawab.

Bila balik ke rumah saya rasa takut, saya hanya duduk di kerusi saja. Saya juga menangis. Saya menangis sebab kerana diri saya juga. Saya rasa kesal.

Saya hanya beritahu saya ada bermalam di rumah Suhaimi. Saya beritahu di Kaunter Kesihatan, Cheng. Ayah saya kemudian hantar saya ke hospital. Saya ada diperiksa oleh doktor.

Masa beritahu bapa saya bermalam di Cheng selepas ayah dan ibu dan Aziz balik.

Saya tidak tahu bila mereka datang, tetapi bila saya balik ke rumah mereka ada di rumah.

Mereka tinggal di Kerubong — tidak jauh dari rumah saya. Mereka datang pada 1 Februari 1995. Tujuan mereka datang ialah untuk mengkahwinkan saya dan Aziz.

When she was cross-examined she said:

Setuju dalam tempoh dua hari itu ada kisah kasih dan sayang. Perasaan kasih dan sayang masih berterusan sehingga sekarang. Tarikh akhir saya berhubung dengan Aziz adalah seminggu dulu. Yang menghalang hubungan ini adalah ibubapa saya. Ibubapa Aziz telah melamar saya. Ibubapa saya menolak. Saya sayangkan Aziz.

In his evidence SP1 said:

Semasa balik di rumah dia menangis dan terus tidur. Saya syak sesuatu. Semasa jumpa mula-mula saya tidak tanya dia, ... Sehingga saya bawa dia untuk pemeriksaan dia tidak beritahu apa-apa. Saya hantar dia untuk pemeriksaan sebab saya rasa ada perkara tidak elok berlaku padanya. Saya rasa begitu sebab dia tidak mahu makan, tidur sahaja. Sebelum hantar ke hospital saya tidak tanya dia apa yang berlaku. Bila saya hantar ke hospital dia ikut saja.

Doktor ada buat pemeriksaan. Masa bawa anak ke hospital saya ada buat laporan polis, di Pondok Polis Hospital Melaka. Doktor periksa setelah laporan polis dibuat.

Having said this he then added:

- A Dia beritahu semasa bersama Aziz dia telah buat hubungan jenis dengan Aziz.

Under cross-examination he said:

- B Anak saya menangis setelah balik ke rumah. Bila sampai dia duduk di luar. Saya tanya dia dan dia masuk ke bilik. Ia tidak keluar dari bilik sehingga besok pagi. Saya jumpa dia bila dia bangun pagi — dalam pukul 7 pagi. Dari 11.30 pagi sehingga 7 pagi esok, saya ada tanya dia — tetapi dia diam. Saya tanya dia bila saya masuk ke bilik dia dan tanya. Dia diam dan tidak beritahu apa-apa.

Semasa ada di ruang tamu lagi dia menangis.

- C SP1 made the police report (exh P1) on 3 February 1995 at 11am. SP2 was examined by the two doctors, namely, Dr Norchik bte Ibrahim ('SP5') and Dr Ng Cheng Hua ('SP9'), a gynaecologist. SP5 said that upon examination she found that SP2 had old multiple tears in her hymen and that it was then one week old. SP9 who examined SP2 on 4 February 1995 said that SP2 had an old tear in the hymen which was between 48 hours to three months' old and that there were no other injuries to the genitalia.

The accused had also made a cautioned statement (exh P5) which was admitted by the learned sessions court judge after a trial within a trial.

- E In his grounds of judgment the learned sessions court judge said that the two important elements that the prosecution had to prove were that there was penetration with or without the consent of SP2 and that she was under 16 years of age at that time of the incident. I shall not refer to the issue concerning the age of SP2 as it was not raised before me and, in any event, it was sufficiently proven by the prosecution. With regard to penetration the learned sessions court judge said in his judgment that the main evidence on this ingredient was from SP2. He then referred to the material parts of her evidence. He concluded that the evidence of SP5 and SP9 '... telah membuktikan kemungkinan ada kemasukan.' He followed it with a reference to the difference in the age of the old tear as testified by both the doctors and said:

- G SP2 telah diperiksa oleh SP5 pada 3 Februari 1995 dan diperiksa oleh SP9 pada 4 Februari 1995. Kedua-dua SP5 dan SP9 tidak dapat menentukan usia sebenar koyakan tersebut. Dalam hal ini saya mendapati memang terdapat koyakan pada selaput dara SP2 pada kedudukan yang dikatakan tetapi usianya tidak dapat ditentukan. Walau bagaimanapun usia koyakan ini telah lebih dari 48 jam. Saya menerima pendapat SP9 bahawa 'old tear' bermaksud koyakan yang telah berusia lebih dari 48 jam. Dalam hal ini saya puas hati koyakan pada selaput dara SP2 adalah koyakan lama, tetapi usia sebenarnya tidak dapat ditentukan.

- I Keterangan kedua-dua SP5 dan SP9 perlu dibaca bersama dengan keterangan SP2 untuk menentukan sebab berlaku koyakan tersebut. Saya mendapati keterangan SP2 tentang hubungan seks beliau dengan tertuduh serta tentang kemasukan kemaluan tertuduh dalam kemaluannya adalah konsisten baik semasa pemeriksaan utama mahupun semasa pemeriksaan balas. Keterangan beliau hampir tidak dicabar melalui penyoalan balas. Saya mendapati tidak ada alasan untuk saya tidak menerima keterangan beliau ini.

Dengan menimbangkan keterangan ketiga-tiga saksi ini secara bersama dan menyeluruh, saya mendapati telah berlakunya kemasukan kemaluan tertuduh ke dalam kemaluan SP2 yang menyebabkan koyakan pada selaput dara di posisi pukul 1 dan pukul 5. Dengan yang demikian pendakwa telah membuktikan elemen ini tanpa sebarang keraguan yang munasabah.

The sessions court judge accepted the evidence of SP9 on the age of the old tear without assigning any reason and by the same breath said that he was satisfied that the age of the tear could not be determined. He then went on to say that the evidence of SP5 and SP9 must be read with the evidence of SP2 to determine the cause of the tear in the hymen. He also said that he accepted the evidence of SP2 on the issue of penetration. He then concluded that on the consideration of the evidence of the three witnesses, he was satisfied that the tear in the hymen of SP2 was caused by the act of the accused.

The learned sessions court judge resolved the conflict in the medical evidence by reading it with the evidence of SP2. It would therefore appear that the evidence of SP2 was used to resolve the conflict in the medical evidence. He also used the medical evidence to support his finding that the tear in the hymen was caused by the accused. In my opinion the findings of the learned sessions judge stemmed from an inadequate appraisal of the law of corroboration which is so vital in cases of this nature. That necessitated me to consider at some length the significance of this area of the law in its application to sexual offences.

THE NEED FOR CORROBORATION IN RAPE CASES

Section 134 of the Evidence Act 1950 ('the Act') states that 'no particular number of witnesses shall in any case be required for the proof of any fact'. The section enshrines the well-recognized maxim that 'evidence has to be weighed and not counted'. On the need for corroborative evidence for the proof of any fact, Sinha J said in *Vadivelu Thevar v State of Madras* AIR 1957 SC 614 in the following terse terms at pp 618-619:

On a consideration of the relevant authorities and the provisions of the Act, the following propositions may be safely stated as firmly established:

- (1) As a general rule, a court can and may act on the testimony of a single witness though uncorroborated. One credible witness outweighs the testimony of a number of other witnesses of indifferent character.
- (2) Unless corroboration is insisted upon by statute, courts should not insist on corroboration except in cases where the nature of the testimony of the single witness itself requires as a rule of prudence, that corroboration should be insisted upon, for example in the case of a child witness, or of a witness whose evidence is that of an accomplice or of an analogous character.
- (3) Whether corroboration of the testimony of a single witness is or is not necessary must depend upon facts and circumstances of each case and and no general rule can be laid down in a matter like this and much depends upon the judicial discretion of the judge before whom the case comes.

Corroboration is not a technical term. It simply means 'confirmation' (see *DPP v Hester* [1973] AC 296). The locus classicus on what amounts to

- A corroborative evidence is the celebrated case of *R v Baskerville* [1916] 2 KB 658 where Lord Reading CJ said at p 667:

We hold that evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it.

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The word 'implicate' does not necessarily mean 'incriminate' or 'inculpate'; it may mean only 'involve' (see *R v Kerim* [1988] 1 Qd R 426). Ong CJ (Malaya) said in *Brabakaran v PP* [1966] 1 MLJ 64 that corroborative evidence is not necessarily restricted to the oral evidence of an independent witness. It may be circumstantial as well as direct (see *R v Tripodi* [1961] VR 186). In *Doney v R* (1990) 171 CLR 207 it was held that consistent with its role of confirming other evidence rather than amounting itself to evidence which necessarily leads to conviction, the corroborative evidence does not need to be proven beyond reasonable doubt. It must be noted that the question of corroboration does not arise unless the evidence of the witness requiring corroboration is itself credible. In this regard Gunn Chit Tuan J (as he then was) said in *TN Nathan v PP* [1978] 1 MLJ 134 at p 137:

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Lord Hailsham has expressed a similar opinion in the English House of Lord's case of *DPP v Kilbourne* [1973] 1 All ER 440 when he said at p 452:

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'Corroboration is only required or afforded if the witness requiring corroboration or giving it is otherwise credible. If his evidence is not credible, a witness's testimony should be rejected and the accused acquitted, even if there could be found evidence capable of being corroboration in other testimony. Corroboration can only be afforded to or by a witness who is otherwise to be believed. If a witness's testimony falls of its own inanity the question of his needing, or being capable of giving, corroboration does not arise.'

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Thus the essence of corroborative evidence is where one creditworthy witness confirms what another creditworthy witness has said (see *Yap Ee Kong & Anor v PP* [1981] 1 MLJ 144).

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Generally in Malaysia there is no specific rule of law that requires the evidence of a witness to be corroborated except in the case of the evidence of a child of tender years under s 133A of the Act. However, in certain types of cases there is a rule of practice which requires evidence to be corroborated. This includes the evidence of a complainant in a case involving a sexual offence. Even in such cases a conviction based on uncorroborated evidence is not illegal. But the rule of practice regulates the manner in which uncorroborated evidence is to be treated, that is to say, the judge must warn himself of the dangers of convicting on such evidence. In saying that the warning must appear in the judgment or grounds of decision of the trial court though no particular form of words need be used, Seah SCJ in delivering the judgment of the Supreme Court in *Ng Yau Thai v PP* [1987] 2 MLJ 214 said at p 216:

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The warning as to the danger of convicting on uncorroborated evidence if the prosecution is relying on the testimony of an accomplice does not involve some legalistic ritual to be automatically recited by the trial magistrate, or that some particular form of words or incantation be used and if not

used, the judgment is deemed to be faulty and the conviction set aside. There is no magic formula and no set words which must be adopted to express the warning.

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In this regard Lord Donovan is delivering his advice in *Chiu Nang Hong v PP* [1965] 1 MLJ 40 said at p 43:

... No particular form of words is necessary for this purpose: what is necessary is that the judge's mind upon the matter should be clearly revealed.

B

With regard to the need for corroboration in rape cases Thomson LP in speaking for the Federal Court in *Din v PP* [1964] MLJ 300 said that the need for corroboration in such cases springs not from the nature of the witness but from the nature of the offence and added at p 301:

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... If, however, she complains of having been raped then both prudence and practice demand that her evidence should be corroborated.

However his Lordship went on to say that though it might be dangerous to find the factum of rape on the uncorroborated evidence of the prosecutrix, once that factum of rape is established there seems to be nothing left to support the view that her identification of the assailant calls for corroboration any more than it would in relation to any other type of offence. Be that as it may, Ong FJ (as he then was) said in the Federal Court decision of *Ah Mee v PP* [1967] 1 MLJ 220, a rape case, that corroboration in the legal sense connotes some independent evidence of some material fact which implicates the accused person and tends to confirm that he is guilty of the offence. This view which accords with the canons of corroboration as enshrined in *R v Baskerville* [1916] 2 KB 658 has been consistently followed (see for example *PP v Ku Hang Chua* [1975] 2 MLJ 99; *PP v Mohamed bin Majid* [1977] 1 MLJ 121 and *PP v Emran bin Nasir* [1987] 1 MLJ 166).

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In the light of the law that I have adverted to it becomes necessary for me to determine the effect and value of the evidence adduced before the learned sessions court judge including the admissibility of the cautioned statement. I will consider them in the following order:

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- (1) Medical evidence;
- (2) The statement made by SP2 to SP1;
- (3) The complaint, if any, of SP2;
- (4) Opportunity of the accused to commit the crime; and
- (5) The cautioned statement of the accused.

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Medical evidence

In *James v R* (1971) 55 Cr App Rep 299, on a charge of rape, it was held that medical evidence showing that the complainant had sexual intercourse at about a time consistent with her allegation, was incapable of affording corroboration of her evidence of the rape, because it did not confirm any more than an act of sexual intercourse, and in particular did not offer any confirmation of the identity of the man involved or of the alleged lack of consent (see also *R v Donat* (1985) 82 Cr App Rep 173; *R v West* (1983) 79 Cr App Rep 45). However, on a charge of rape where consent is

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A irrelevant, medical evidence showing any fresh tear in the hymen is sufficient to corroborate the evidence of the victim on the factum of rape (see *Syed Abu Tahir all Mohamed Esmail v PP* [1988] 3 MLJ 485). With regard to an old rupture of the hymen, Thomson LP said in *Din v PP* [1964] MLJ 300 at p 301:

B ... The hymen was ruptured but this was not recent. In short this evidence did not support in any way that the woman had had sexual intercourse within the previous twelve hours but on the other hand it did not negative such a possibility.

C *R v Kerim* [1988] 1 Qd R 426 is a case where the accused was charged with indecent dealings with and rape of his 12-year-old step-daughter. The evidence of the complainant was said to have been corroborated by medical evidence that her hymen was not intact. This evidence was consistent with her account that the accused had raped her, but since the rupture was not established to have occurred at a time or place which involved the accused, this evidence was held to be incapable of affording corroboration.

D In the appeal before me the testimony of SP5 and SP9 as to the age of the tear is at variance with each other. SP5 who examined SP2 on 3 February 1995 said that the tear was then one week old. If the evidence of SP5 is to be accepted then it would not be corroboration of the factum of rape as it would have happened at a point of time prior to the date of the incident. SP9 who examined SP2 four days after the incident said that the age of the tear could range from 48 hours to three months. In fact SP9 said that SP2 could have had sex at least 48 hours before she examined her. This would not therefore rule out the possibility that the tear to SP2's hymen was caused after the alleged incident as she was examined by SP9 on 4 February 1995 and the incident was said to have taken place four days prior to that. This would mean that SP9's evidence would also not corroborate the evidence of SP2 on the factum of rape. It is therefore my view that it is unsafe to rely on the evidence of SP5 and SP9 to corroborate the evidence of SP2 on the factum of rape. My conclusion is fortified by the authorities that I have alluded to a short while ago.

G In the circumstances, the use of the evidence of SP5 and SP9 together with that of SP2 by the learned sessions court judge to conclude that the tear was caused by the act of the accused is not sustainable in law.

The statement made by SP2 to SP1

H Exhibit P1, which was admitted by the learned sessions court judge, is the police report made by SP1 based on what SP2 had told him. He also gave oral evidence of what she had told him. The learned sessions judge made no specific mention of the use he made of these pieces of evidence or whether, in fact, he had rejected them. It therefore falls upon me to consider their admissibility and evidential value.

I Lord Reading CJ said clearly in *R v Baskerville* [1916] 2 KB 658 that evidence in corroboration must be independent testimony. In *R v Whitehead* [1929] 1 KB 99 Lord Hewart CJ decidedly declared that the story told by the victim of an unlawful sexual intercourse case to her mother was not

capable of amounting to corroboration because it emanated from the girl herself. This is what his Lordship said at p 102: A

... In order that evidence may amount to corroboration it must be extraneous to the witness who is to be corroborated. A girl cannot corroborate herself, otherwise it is only necessary for her to repeat her story some 25 times to get 25 corroborations of it. B

However, in Malaysia the reception of such evidence is permitted by s 157 of the Act. The section reads as follows:

In order to corroborate the testimony of a witness, any former statement made by him whether written or verbal, on oath, or in ordinary conversation, relating to the same fact at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved. C

An anthology of cases may be cited where this section is considered. Some recognized the fact that consequent to this section there is a difference in the law of corroboration in England and Malaysia. Others made venturesome and intrepid inroads into the section to harmonize it with the English norms of corroboration. D

In 1935 in *R v Velayuthan* [1935] MLJ 277, Whitley J while speaking for the Court of Criminal Appeal emphasized that the local law on corroboration is different from that in England as s 157 has no counterpart in the English law of evidence. His Lordship went on to hold that a complaint if made immediately would be treated as corroboration although in England it would not be so regarded. In *R v Koh Soon Poh* [1935] MLJ 120, Terrell J made the same observations. These two cases were cited with approval by Ismail Khan J (as he then was) in *Lim Baba v PP* [1962] MLJ 201 where his Lordship said that it was not a misdirection to accept as corroboration, the complaint by a witness shortly after an illegal sexual assault of the facts complained of. E F

The trend of judicial thinking began to change. Ong J (as he then was) was opposed to the view that a previous statement by a witness, though admissible under s 157 of the Act, was of any genuine corroborative value. In *Mohamed Ali v PP* [1962] MLJ 230 his Lordship said at p 231: G

It will not be out of place here to say a few words about s 157 of the Evidence Ordinance. Admissibility of a previous statement under that section must not be confused with the weight to be given to it. Corroboration, strictly speaking, means independent corroboration as explained in *R v Baskerville* [1916] 2 KB 658. In my opinion true corroboration by independent evidence from an extraneous source should be distinguished from 'corroboration' as it appears in s 157, which rests on the principle that consistency between a previous statement by a witness and his present evidence may afford some ground for believing him. The value of such a statement as corroboration may be infinitesimal, as in the majority of cases it is. On the other hand, by reason of the abundance of detail it may contain as to the facts and circumstances surrounding any relevant transaction, it may be capable of being cross-checked for truthfulness against other relevant evidence, in which case, of course, it may be effective corroboration, but only because it has been shown to be true. H I

- A In *Ah Mee v PP* [1967] 1 MLJ 220 Ong FJ (as he then was) reiterated that corroboration connotes some independent evidence of some material fact which implicates the accused person and tends to confirm that he is guilty of the offence. In *Wong Thin Yit v Mohamed Ali* [1971] 2 MLJ 175 a police report made by the appellant after the accident was held to be hearsay as he did not appear at the trial to testify. 'If he had done so, the report would undoubtedly have had some value as corroborative evidence within the meaning of s 157 of the Evidence Ordinance', per Ali FJ at p 180.
- B In *Karthiyayani & Anor v Lee Leong Sin & Anor* [1975] 1 MLJ 119 the trial judge held that the previous statement made by the first respondent at the inquest was consistent with the testimony he gave in court. The Federal
- C Court felt that the trial judge obviously had s 157 of the Act in mind in his finding on the previous statement and accordingly, went on to consider whether a witness can corroborate himself. Raja Azlan Shah FJ (as His Highness then was) said at p 120:

- D ... It is settled law that a person cannot corroborate himself but it would appear that s 157 of the Evidence Act enables a person to corroborate his testimony by his previous statement. The section adopts a contrary rule of English jurisprudence by enacting that a former statement of a witness is admissible to corroborate him, if the former statement is consistent with the evidence given by him in court. The rule is based on the assumption that consistency of utterance is a ground for belief in the witness's truthfulness,
- E just as inconsistency is a ground for disbelieving him.

- However, his Lordship added that 'it constitutes a very weak type of corroborative evidence as it tends to defeat the object of the rule that a person cannot corroborate himself'. In *Yap Ee Kong & Anor v PP* [1981] 1 MLJ 144 the Federal Court on the facts of that case answered the
- F question as to whether corroboration is provided by proof of consistent statements made out of court before trial in the negative. In *PP v Paneerselvan & Ors* [1991] 1 MLJ 106, Edgar Joseph Jr J (as he then was) in ruling that a previous statement was 'technically' admissible, excluded it as corroboration under s 157 of the Act in the exercise of his discretion on the ground that its probative value was outweighed by its prejudicial
- G effect.

In 1971 the Act was amended by adding s 73A to it by virtue of PU (A) 261 of 1971. This section which makes provisions, inter alia, for the admissibility of documentary hearsay as evidence in civil cases subject to the fulfilment of certain requirements, reads as follows:

- H (1) Notwithstanding anything contained in this chapter, in any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied:
- I (a) if the maker of the statement either:
- (i) had personal knowledge of the matters dealt with by the statement; or
 - (ii) where the document in question is or forms part of a record purporting to be a continuous record, made the statement (so far as the matters dealt with thereby are not within his

personal knowledge) in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have had, personal knowledge of those matters; and

(b) if the maker of the statement is called as a witness in the proceedings:

Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, or unfit by reason of his bodily or mental condition to attend as a witness, or if he is beyond the seas and it is not reasonably practicable to secure his attendance, or if all reasonable efforts to find him have been made without success.

(2) In any civil proceedings, the court may at any stage of the proceedings, if having regard to all the circumstances of the case it is satisfied that undue delay or expense would otherwise be caused, order that such a statement as is mentioned in subsection (1) shall be admissible as evidence or may, without any such order having been made, admit such a statement in evidence:

(a) notwithstanding that the maker of the statement is available but is not called as a witness; and

(b) notwithstanding that the original document is not produced, if, in lieu thereof, there is produced a copy of the original document or of the material part thereof certified to be a true copy in such a manner as may be specified in the order or as the court may approve, as the case may be.

(3) Nothing in this section shall render admissible as evidence any statement made by a person interested at a time when proceedings were pending or anticipated, involving a dispute as to any fact which the statement might tend to establish.

(4) For the purposes of this section, a statement in a document shall not be deemed to have been made by a person unless the document, or the material part thereof was written, made or produced by him with his own hand, or was signed or initialled by him, or otherwise recognized by him in writing as one for the accuracy of which he is responsible.

(5) For the purpose of deciding whether or not a statement is admissible as evidence by virtue of subsections (1)–(4), the court may draw any reasonable inference from the form or contents of the document in which the statement is contained, or from any other circumstances, and may, in deciding whether or not a person is fit to attend as a witness, act on a certificate purporting to be the certificate of a registered medical practitioner, and, where the proceedings are with assessors, the court may in its discretion reject the statement notwithstanding that the requirements of this section are satisfied with respect thereto, if for any reason, it appears to it to be inexpedient in the interests of justice that the statement should be admitted.

(6) In estimating the weight, if any, to be attached to a statement rendered admissible as evidence by this Act, regard shall be had to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement, and, in particular, to the question whether or not the statement was made contemporaneously with the occurrence or existence of the facts stated, and to the question whether or not the maker of the statement had any incentive to conceal or misrepresent facts.

A (7) For the purpose of any rule of law or practice requiring evidence to be corroborated, or regulating the manner in which uncorroborated evidence is to be treated, a statement rendered admissible as evidence by this Act shall not be treated as corroboration of evidence given by the maker of the statement.

B Subsections (3), (4) and (5) of the section refer to the application of the section itself. On the other hand sub-s (6) and (7) go beyond the scope of the section. Subsection (6) deals with the weight, if any, to be attached to a statement rendered admissible by '... this Act ...'. Subsection (7) is the part that requires careful scrutiny. It states in crystalline terms that for the purposes of any rule of law or practice requiring evidence to be corroborated, or regulating the manner in which uncorroborated evidence is to be treated, a statement rendered admissible as evidence by '... this Act ...' shall not be treated as corroboration of evidence given by the maker of the statement. The word 'statement' has not been defined in the Act. It means something that is stated and the element of communication to another person is not included in it (see *PP v Paneerselvan & Ors* [1991] 1 MLJ 106).

E Section 73A(7) has a direct bearing on evidence rendered admissible by s 157 of the Act. It dictates the manner in which such evidence is to be treated. The resultant matter for deliberation is whether the former can incarcerate the application and ambit of the latter as they are in conflict with each other. Reference to some rules of statutory construction will provide the answer. Firstly, it is settled law that a marginal note serves as a guide to the interpretation of a section (see *Re Tan Keng Tin & Anor* [1932] MLJ 134; *Foo Loke Ying & Anor v Television Broadcasts Ltd & Ors* [1985] 2 MLJ 35; *Lim Phin Khian v Kho Su Ming* [1996] 1 MLJ 1). The marginal note to s 73A states that it relates to the 'Admissibility of documentary evidence in civil cases, etc'. The abbreviation 'etc' in the note makes it abundantly clear that the admissibility of documentary evidence in civil cases is only one of the matters that the section covers. Thus the section is not restricted in its application just to the admissibility of documentary evidence in civil cases. Secondly, s 73A must be read together with the whole Act and not in isolation. To read the section in isolation from the enactment of which it forms a part is to offend against the cardinal rule of statutory interpretation that requires the words of a statute to be read in their context (see *Cooper Brookes (Wollongong) Pty Ltd v FCT* (1981) 35 ALR 151). Thirdly, it must be noted that s 157 is general in nature while s 73A(7) is specific. The general principle is that provisions of general application give way to specific provisions when in conflict. This principle was lucidly stated by Gopal Sri Ram JCA in *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng* [1995] 1 MLJ 719 at pp 758 and 759 in the following words:

I ... It lies in the rule of construction expressed in the maxim *generalibus specilia derogant*. Where there are two provisions of written law, one general and the other specific, then, whether or not these two provisions are found in the same or different statutes, the special or specific provision excludes the operation of the general provision.

It is therefore clear that this approach is also applicable to the resolution of internal conflicts between sections within an Act (see also *Perpetual Executors & Trustees Assoc of Australia Ltd v FCT* (1948) 77 CLR 1). In *Refrigerated Express Lines (A' Asia) Pty Ltd v Australian Meat and Live-stock Corp* (1980) 29 ALR 333 it was held that it is common-sense that the drafter would have intended the general provisions to give way should they be applicable to the same subject matter as is dealt with specifically. Fourthly, where through an amendment a new provision is inserted into a principal act and that provision speaks of 'this Act' (as in this case), it speaks of the whole Act, which from the time of the amendment it forms part of, in the form which it may from time to time thereafter assume (see *Ocean Road Motel Pty Ltd v Pacific Acceptance Corp Ltd* (1963) 109 CLR 276). Fifthly and finally, in the event of there being an inconsistency between two provisions of a law, the one last enacted should prevail, in view of the assumption that it is the last expression of the legislative will or intent that should prevail (see *The Dean, etc of Ely v Bliss* (1842) 11 LJ Ch 351).

Where two provisions in a statute appear to be in conflict with each other the first task is to ascertain whether they can be harmoniously interpreted. As both ss 73A(7) and 157 of the Act cannot be harmoniously interpreted it is my view that s 73A(7) must prevail in the light of the rules of construction that I have adverted to. In the upshot a statement rendered admissible by s 157 cannot be treated as corroboration of evidence given by the maker of the statement in instances falling within the meaning of s 73A(7). Section 73A(7) has restated the law of corroboration in full glory as originally formulated in *R v Baskerville* [1916] 2 KB 658 and has demolished the uneasiness that surrounded s 157. This view is anchored on the foundation laid in *PP v Chee Kon Fatt* [1991] 3 CLJ 2564 by Edgar Joseph Jr J (as he then was) where his Lordship said at p 2565:

The only evidence in the case for the prosecution as to this alleged fact was the uncorroborated testimony of Chettavelu and, although it was said that he did give his version of the facts as deposed to in this court, to his superior Chief Inspector Suleiman and to the Investigation Officer DSP Yeap Hooi Pin, within a short while after the arrest of the accused, nowhere in his police report made in writing on that day at 8.15pm did he even mention the fact that he had seen the box on the petrol tank of the motorcycle seated astride which was the accused nor was any explanation vouchsafed to this court for this glaring omission. *In any event, repetition is not corroboration in the true sense within the meaning of R v Baskerville* [1916] 2 KB 658.

This proposition has received statutory recognition in s 73A of the Evidence Act 1950 (Revised 1971) ... (Emphasis added).

It therefore follows that the evidence of SP1 and exh P1 based on the statement made by SP2 is incapable of amounting to corroborative evidence. Exhibit P1 cannot be treated as corroboration of the evidence of SP1. The oral evidence of SP1 cannot be treated as corroboration of the evidence of SP2. In so concluding I must emphasize that the Act draws a sharp distinction between a statement and a complaint made in certain circumstances which I shall ratiocinate in the succeeding paragraph.

A *The complaint, if any, of SP2*

Under English law the fact that a complaint was made by the prosecutrix in cases involving sexual offences shortly after the alleged occurrence, and particulars of the complaint, so far as they relate to the charge, may be given in evidence by the prosecution (see *R v Lillyman* [1896] 2 QB 167).

B The complaint is evidence of the consistency of the conduct of the prosecutrix and as being inconsistent with her consent. It is not admissible as evidence of the facts complained of (see also *R v Osborne* [1905] 1 KB 551 and *R v Cummings* [1948] 1 All ER 551).

C In Malaysia a complaint made by a rape victim and the circumstances under which it was made is relevant under s 8 illustration (j) of the Act. The section and the illustration are in the following terms:

(1) Any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact.

D (2) The conduct of any party, or of any agent to any party, to any suit or proceeding in reference to that suit or proceeding, or in reference to any fact in issue therein or relevant thereto, and the conduct of any person an offence against whom is the subject of any proceeding, is relevant if the conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto.

E *Explanation 1* — The word ‘conduct’ in this section does not include statements unless those statements accompany and explain acts other than statements; but this explanation is not to affect the relevancy of statements under any other section of this Act.

Explanation 2 — When the conduct of any person is relevant any statement made to him or in his presence and hearing which affects his conduct is relevant.

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Illustrations

(j) The question is whether A was ravished.

The facts that shortly after the alleged rape she made a complaint relating to the crime, the circumstances under which and the terms in which the complaint was made are relevant.

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The fact that without making a complaint she said that she had been ravished is not relevant as conduct under this section, though it may be relevant:

(i) as a dying declaration under s 32(a); or

(ii) as corroborative evidence under s 157.

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The illustration makes a distinction between a complaint and a statement. A statement is made relevant only as corroborative evidence under s 157. Of course such evidence will now be subject to the restriction imposed by s 73A(7) as stated earlier. With regard to a complaint, illustration (j) demonstrates that the fact of the complaint having been made, the circumstances under which, and the terms in which it was made are relevant. It is therefore a substantive piece of evidence. It is part of the *res gestae* principle under s 6 of the Act. It will therefore not be hit by the prohibition contained in s 73A(7).

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The difference between a complaint and a mere statement in s 8 is that the former is expressive of feelings, the latter of knowledge, the former evidences conduct, but the latter has no such tendency. A complaint, unlike a bare statement, is made with a view to redress or punish and is made to someone in authority, such as the police, but not necessarily to a public officer (see *Woodroffe & Ameer Ali's Law of Evidence* (12th Ed) pp 292–293). See also *PP v Teo Eng Chan & Ors* [1988] 1 MLJ 156 where the distinction between a complaint and a statement is made clear. On the manner in which a complaint should be made, I refer to the admirable book *The Law of Evidence* Vol 1 by ERSR Coomaraswamy where the learned author says at pp 240–241:

The complaint must be voluntary and spontaneous, and not elicited by leading, inducing or intimidating questions. If the circumstances indicate that, but for the questioning, there would probably have been no voluntary complaint, the answers are inadmissible. For example, 'Did X assault you? Did he say this to you?' would make the answers inadmissible. But if the questions merely anticipate a statement which the complainant was about to make, the fact that the questioner spoke first is immaterial; for example, 'What is the matter? Why do you look worried?' would not render the answer inadmissible. The question is one for the discretion of the judge.

A complaint of rape made in consequence of a threat made, for example, by the girl's father, would not be admissible, particularly where the girl admitted that but for the threat the complaint would never have been made (see *R v Arthur Fernando* (1940) 42 NLR 76). In a South African case, a mother noticed that her child had been sexually assaulted and threatened to beat her with a stick unless she revealed who had done it. The child then made a complaint against her step-father, but the appellate division excluded it on the ground that it had been elicited by intimidation (see *S v T* (1963) 1 SA 484 (AD)).

I shall now consider whether the words uttered by SP2 to her father amounted to a complaint. She said that when she returned home she was frightened. The evidence of SP1 and SP2 revealed that SP2 made the statement only after repeated questioning by SP1 and that, too, only on 3 February 1995 at the counter of the Health Clinic at Cheng after which the police report was made. Even then, as testified by SP2, she only told SP2 that '... saya ada bermalam di rumah Suhaimi.' The statement therefore does not relate to the crime for which the accused has been charged and, in any event, was not made voluntarily and spontaneously. The burden of proof is on the prosecution to establish that the statement amounts to a complaint within the meaning of s 8 of the Act which it has failed to do.

In the premises the evidence of SP1 including exh P1 based on what SP2 had told him is inadmissible as evidence of conduct. Their effect as corroborative evidence under s 157 of the Act has already been considered.

Opportunity of the accused to commit the crime

SP6 said in his evidence that on 31 January 1995 the accused came to his house at 8pm to spend the night there. He then added:

Dia duduk dengan kawan dia. Saya tidak tahu nama — SP2 dicamkan.

A Under cross-examination he said:

Kedua mereka ada minum di rumah saya pada waktu pagi.

In this regard SP2 said in her evidence:

B Saya ada masuk ke rumah. Suhaimi keluar selepas lebih kurang 30 minit kami masuk. Dia balik pada 1 Februari 1995 pagi. Masa Suhaimi balik kami sudah bangun. Bila Suhaimi balik, kami pun balik.

C From the evidence adduced it is clear that SP6 allowed the accused to spend the night in his house on 31 January 1995. He saw SP2 there on that night and the following morning. The question for deliberation is whether this evidence is sufficient to corroborate the testimony of SP2 that the accused raped her in SP6's house. Although it constitutes evidence of opportunity it is settled law that evidence of mere opportunity, without more, cannot amount to corroboration.

D In *Thomas v Jones* [1921] 1 KB 22 the appellant was charged on a complaint preferred by the respondent with being the father of a bastard child of the respondent. The appellant was a farmer and a bachelor. The respondent was his housekeeper. On the morning of the birth, when the respondent was in labour, the appellant, who had no other female servants, lit a fire for her and took her some tea and brandy. He also sent for the doctor. After the birth he allowed her and the child to remain for five weeks and two days in his house. There was no evidence whether she was sufficiently recovered to have left at an earlier date. The appellant admitted that during those five weeks and two days he never asked the respondent who the father of her child was. The respondent in her evidence said that during that time she asked the appellant what he was going to do about the child, and he said that there was nothing for him to do but to pay. After the respondent had left his house she wrote him a letter charging him with being the father of the child, and asking if he meant to pay for maintenance of the child. He did not reply that letter. It was held that these facts did not afford any evidence corroborating the evidence of the respondent in some material particular. Bankes LJ said at p 35:

G I say, with great respect to anyone who takes a different view, that it seems to me grotesque to suggest that the fact that the appellant, a bachelor with a single woman only in the house on the farm, sent for the doctor when the woman was apparently in great pain and seriously ill, is in any way inconsistent with his story that he was never intimate with her, and is more consistent with her story that he was the father of her child.

H *Cracknell v Smith* [1960] 1 WLR 1239 was an affiliation case, in which the evidence of the complainant was required to be corroborated as a matter of law. The complainant gave evidence of having had sexual intercourse with the respondent at about the likely time of conception. It was suggested that the evidence of her mother to the effect that the respondent had visited her home to see the complainant at about the relevant period, and had met the complainant at the corner of the street on various occasions, might amount to corroboration. The argument was rejected on appeal by the divisional court. The evidence amounted to no more than evidence of

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opportunity, and did not either directly or by any permissible inference implicate the respondent in an act of sexual intercourse with the complainant. In *Ridley v Whipples* (1916) 22 CLR 381 the only evidence relied upon by way of corroboration was that of a witness who deposed that about the relevant time he, together with the complainant and the appellant, were sitting together in the evening in the kitchen of her father's house, in which room there was a couch, and that about 9.30pm he went to bed, and that although he slept in the room next to the appellant he did not hear him come to bed. Griffith CJ said at p 387:

In the case of *Dawson v M'Kenzie* (1908) SC 698 the court of session in Scotland held that proof of opportunity of intercourse may be corroborative evidence if of such character as to establish suspicion. In my opinion, when reliance is placed upon proof of opportunity that proof must be supplemented by proof of circumstances of such a nature as to lead to the inference that it was probable that advantage would be taken of the opportunity. It is impossible to define in advance what circumstantial evidence would be sufficient for that purpose. In the present case the proof stops short at proof of opportunity, which is insufficient.

It is my view that in the appeal before me the evidence adduced stops short at proof of opportunity. The evidence of opportunity should be supplemented by proof of circumstances of such a nature as to lead to the inference that it was probable that advantage would be taken of the opportunity. In my opinion admissible medical evidence which corroborates the evidence of the complainant would have constituted such supplementary evidence. In the circumstances the only available evidence is that of mere opportunity which cannot amount to corroboration of the evidence of SP2.

The cautioned statement made by the accused

The learned sessions court judge in his grounds of judgment said that he admitted the cautioned statement (exh P5) made by the accused as he was satisfied that it was voluntarily made. In his submission before me learned counsel for the accused contended that exh P5 had been wrongly admitted in evidence. He said that:

- (i) the statement was recorded under oppressive circumstances as the accused was not allowed to have his lunch;
- (ii) the recording officer had told the accused, 'Saya kata ceritakan kepada saya hal yang sebenarnya berlaku';
- (iii) the recording officer was aware of the background of the case; and
- (iv) the statement was recorded as a result of cross-examination by the recording officer.

In addition, while perusing the record of appeal I had noticed that certain words which may tender exh P5 as involuntary were uttered by the father of the accused in the presence of two police officers. I felt that it was my duty to consider the effect of the use of the words in question as s 113(1)(a)(ii) of the Criminal Procedure Code (FMS Cap 6) requires the court to exclude a statement if it appears to have been caused by any inducement, threat or promise. In this regard I must add that whenever any sort of doubt creeps

- A into the mind of the court it is for the prosecution to show affirmatively to the complete satisfaction of the court the voluntary nature of the confession (see *PP v Aris bin Yunus* [1989] 1 CLJ 239). In *Boudreau v R* (1949) 93 CCC 55 Kervin J said that all the surrounding circumstances must be investigated and, if upon their review the court is not satisfied of the voluntary nature of admission, the statement must be rejected. Accordingly,
- B I invited both parties to submit on this aspect of the case, which they did, and I treated it, for the purposes of this judgment, as the fifth ground.

- I then considered the grounds advanced by learned counsel bearing in mind the fact that an appellate court is entitled to interfere with a finding of fact relating to the voluntariness of a confession if that finding
- C has been arrived at without applying the true and relevant legal tests and consideration of relevant matters (see *Hasibullah bin Mohd Ghazali v PP* [1993] 3 MLJ 321).

- Before I proceed any further it may perhaps be useful to consider the burden of proof in a trial within a trial as it is relevant for making a ruling
- D on the issues before me. The nature of the burden resting upon the prosecution in order to establish the voluntariness and, therefore, the admissibility of statements made by an accused has long been accepted as it was stated by Viscount Sumner in *Ibrahim v R* [1914] AC 599 where his Lordship said at p 609:

- E It has long been established as a positive rule of English criminal law, that no statement by an accused is admissible in evidence against him unless it is shewn by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority.

- F When an accused raises the issue of voluntariness of a statement made by him there is no onus on him to negative it. In this regard Edgar Joseph Jr J (as he then was) said in *PP v Chong Boo See* [1988] 1 CLJ 679 at p 687:

I recognized that the onus was on the prosecution to prove voluntariness beyond all reasonable doubt and not for the defence to prove involuntariness.

- G In reiterating that there is no onus on the accused to show involuntariness Edgar Joseph Jr SCJ said in *Hasibullah bin Mohd Ghazali v PP* [1993] 3 MLJ 321 at pp 331–332:

- First, it is a fundamental principle of our criminal law that in deciding on the issue of admissibility of a confession made by an accused person, the onus is not on the accused to show involuntariness but on the prosecution to prove beyond any reasonable doubt that the confession was voluntary. (See eg *Ibrahim v R* [1914] AC 599, *Wong Kam-ming v R* [1980] AC 247). In holding, as he did in fact hold, that ‘the accused must show that he was put in fear in order that the statement should result’, the judge had reversed the onus and disregarded the requirement that the prosecution must prove beyond any reasonable doubt that the confession was voluntary.
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The passage that I have just referred to is clearly confined to the burden of establishing (the legal burden) the voluntariness of the confession based on the manner in which the learned trial judge had described the burden on the accused. The burden of establishing a case must be contrasted with

the burden of introducing evidence (the evidential burden). The former is governed by s 101 of the Act which states: A

- (1) Whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person. B

The latter is governed by s 102 of the Evidence Act 1950 which states:

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side. C

The burden of establishing a case rests throughout the trial on the party who asserts the affirmative. However, the burden of introducing evidence in a case shifts constantly as evidence is introduced by one side or the other. The distinction between both the burdens was ably explained by Lee Hun Hoe J (as he then was) in *Wong Sieng Ping v PP* [1967] 1 MLJ 56 at pp 57–58: D

The appellant contended that the learned magistrate was wrong to say that the burden of proof had shifted to the appellant. He submitted that, subject to the defence of insanity and in offences where onus of proof is specially dealt with by statute, the burden of proof never shifts to an accused person, in this case the appellant. There should be no ambiguity where the liberty of the subject is involved. E

The learned deputy public prosecutor conceded that it would be fatal if it was a summing-up to a jury but argued that it is not necessarily fatal where it is not a jury trial. He said that unless it is shown that the learned magistrate misunderstood what was written the conviction should not be disturbed. He pointed out that the learned magistrate stated the law accurately at p 26 of the record in these words: F

‘It is well established even before the case of *Woolmington v DPP* [1939] AC 462 that while the prosecution must prove the guilt of the prisoner, there is no such burden laid on the prisoner to prove his innocence and it is sufficient for him to raise a doubt as to his guilt. It is also well established law that when the prosecution has discharged the burden of proof then the accused is under an obligation to explain the circumstances appearing against him. The burden of adducing evidence shifts on to him.’ G

The learned deputy public prosecutor contended that the learned magistrate meant the tactical onus in the sense that if the appellant went into the box and gave evidence then the burden was shifted to the appellant to give explanation. H

It is confusing to speak of the shifting of burden of proof. This would give rise to the question what do words ‘burden of proof’ as used by the learned magistrate mean. It is stated in *Woodroffe & Ameer Ali’s Law of Evidence* (8th Ed), at p 678: I

‘The phrase “burden of proof” has two distinct meanings namely the burden of establishing a case and the burden of introducing evidence. The burden of establishing a case remains throughout the entire case, where the pleadings originally place it. It never shifts. The party,

- A whether plaintiff or defendant, who substantially asserts the affirmative of the issue has this burden of proof. It is on him at the beginning of the case; it continues on him throughout the case; and when the evidence, by whomsoever introduced, is all in, if he has not, by the preponderance of evidence required by law, established his position or claim, the decision of the tribunal must be adverse to such pleader. On the other
- B hand, the burden of proof, in the sense of burden of evidence, may shift constantly as evidence is introduced by one side or the other — as one scale or the other preponderates over its fellow. To carry out the same metaphor; so often and so long as the scale containing an adverse amount of evidence preponderates to a certain extent the duty of necessity rests on a party to introduce opposing evidence which shall
- C restore the equipoise, or, if possible, strike a new balance.’

That the onus of proof of guilt never shifts to the accused is clear and I quote again from *Woodroffe & Ameer Ali*:

- ‘The onus of proving everything essential to the establishment of the charge against the accused lies upon the prosecution who must prove the charge substantially as laid. The onus never changes.’
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This matter is set with greater clarity in *Popple’s Canadian Criminal Evidence* as appears from the following extract from pp 416–417:

- ‘In a criminal case it is always the duty of the prosecution to prove the guilt of the accused ‘beyond reasonable doubt’. But the expression ‘burden of proof’ has two aspects — (a) that of ‘establishing a case’ (a matter of ‘law’); (b) that of ‘introducing evidence’ (a matter of ‘procedure’). The onus of ‘establishing a case’ against the accused rests upon the Crown throughout the trial. It must prove every ‘essential ingredient’ of the crime. But the burden of ‘introducing evidence’ will be satisfied by the production of evidence which, if unanswered and believed, raises a ‘prima facie’ case upon which the jury might be justified in finding verdict. And where the Crown has established such facts as without more will justify the jury in finding the accused (guilty), he is not entitled to an ‘acquittal’ unless he does satisfy the burden which is then cast upon him of introducing evidence, but the extent of that burden is not to prove his innocence or honesty but merely to raise
- E a “reasonable doubt” in the minds of the jury as to his guilt. And where an onus is placed upon him by statute to establish his innocence or some other fact, the extent of that onus is only to satisfy the jury of the “probability” of that which he is called upon to establish, for he is not required to prove any fact “beyond reasonable doubt”.
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- H *Monir’s Principles and Digest of the Law of Evidence* (4th Ed) Vol 2, p 605 dealing with the matter under the heading of *Onus in criminal cases* states:

- ‘A criminal case is a “proceeding” within the meaning of s 102 (similar s 104 of the Sarawak Evidence Ordinance) and the burden of proof in such proceeding lies on the prosecution. The elementary principle of criminal law, that in all cases the burden of proof lies upon the prosecution to bring the guilt home to the accused, does not admit of any exception. Generally in criminal cases, unless otherwise directed by statute, the presumption of innocence casts on the prosecutor the burden of proving every ingredient of the offence, even though negative averments be involved therein; and the difficulty of proving the necessary ingredients of the offence is no ground for exempting the prosecutor
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from that duty. The accused is entitled to keep mum casting the entire burden on the prosecution to prove his guilt, and by legally admissible mode of proof. In criminal cases the onus of proving the general issue never shifts, and it lies upon the prosecution to prove, by relevant evidence and beyond reasonable doubt, the guilt of the accused. It is not right for a criminal court to convict an accused person because the defence theory appears to it to be unreasonable or does not appear to it to have been established. Silence of the accused cannot be substituted for proof by prosecution. An accused person must always be presumed to be innocent until he has been found to be guilty. The burden of establishing any special issue raised by the accused rests upon him, but there is always the burden of the general issue as to the guilt of the accused person, which always rests upon the prosecution and never changed.'

It is clear that the onus of proof of guilt always rests upon the prosecution and never shifts to the accused under s 104 of the Evidence Ordinance. This onus never shifts to the accused 'to give an explanation' or 'to establish a case' as it would be inconsistent with the presumption of innocence.

As the law of evidence is equally applicable to a trial within a trial just as in any other trial, it follows that the principles relating to the two burdens must be similarly applied. In the light of the specific objections raised by learned counsel on the admissibility of exh P5 I shall, in order to facilitate the making of a ruling, briefly refer to the incidence of the evidential burden on the accused.

Abdoolcader FJ said in *Dato Mokhtar bin Hashim v PP* [1983] 2 MLJ 232 that it appears from the decision in *DPP v Ping Lin* [1976] AC 574 that the classic test of the admissibility of an accused's confession should be applied in a manner which is part objective and part subjective. In *DPP v Ping Lin* Lord Hailsham of St Marylebone said at p 601 that '... what excludes evidence is a chain of causation resulting from words or conduct on the part of the person in authority ... giving rise to a decision by the accused actuated by fear of prejudice or hope of reward'. The subjective nature of the admissibility of a cautioned statement can also be clearly seen in the language of s 113 (1)(a)(i) of the Criminal Procedure Code (FMS Cap 6) itself and it reads as follows:

Provided that:

- (a) no such statement shall be admissible or used as aforesaid:
- (i) if the making of the statement appears to the court to have been caused by any inducement, threat or promise having reference to the charge proceeding from a person in authority and sufficient in the opinion of the court to give the person charged grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceeding against him.

Thus what is important is the effect that the inducement, threat or promise has on the accused. In this respect Brennan J in speaking for the Federal Court of Australia in *Collins v R* (1980) 31 ALR 257 said at p 307:

So the admissibility of the confession as a matter of law (as distinguished from discretion, later to be discussed) is not determined by reference to the

- A propriety or otherwise of the conduct of the police officers in the case, but by reference to the effect of their conduct in all the circumstances upon the will of the confessionalist. The conduct of police before and during an interrogation fashions the circumstances in which confessions are made and it is necessary to refer to those circumstances in determining whether a confession is voluntary. The principle, focussing upon the will of the person confessing, must be applied according to the age, background and psychological condition of each confessionalist and the circumstances in which the confession is made. Voluntariness is not an issue to be determined by reference to some hypothetical standard; it requires a careful assessment of the effect of the actual circumstances of a case upon the will of the particular accused.
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- C It is therefore clear that the inducement, threat or promise must have 'caused' the person to make the statement. In the Indian Supreme Court case of *Pyare Lal v State of Rajasthan* AIR 1963 SC 1094 Subba Rao J said that to determine involuntariness the mere existence of the threat, inducement or promise is not enough. As Sharma J said in *PP v Law Say Seck & Ors* [1971] 1 MLJ 199 one should be able to say that without it the person would not have made a statement. It follows that an inducement, threat or promise *per se* is insufficient to render the confession inadmissible. As PK McWilliams QC said in his book entitled *Canadian Criminal Evidence* (1988) (3rd Ed) at pp 15-32, the defence should recognize that it has an evidential burden to elicit facts which bear on the subjective vulnerability of its client. This burden may be discharged by cross-examining the prosecution witnesses or by the accused leading evidence on the issues involved. In this respect Rigby J said in *PP v Teh Lye Tong* (1964) 3 MC 208 at p 214:
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- F It is important to observe that the words were ruled as inadmissible solely on the submission of defending counsel. There was no evidence before the learned president that the words 'what tolong' had operated on the mind of the accused as an inducement so as to give him grounds which would appear to him reasonable for supposing that by admitting he had opium he would gain any advantage or avoid any evil of a temporal nature. There was at that stage no charge whatsoever against him; not indeed, could there be any charge against him at that stage since the opium had not yet been found. I have said that, in my view, in the entire absence of further explanation or clarification, the words 'what tolong' were incapable of constituting an inducement within the meaning of s 24 of the Evidence Ordinance. But if they were so capable of such a meaning, then I think the learned president, following the practice adhered to as regards written confession, should have heard further evidence, including that of any other prosecution witnesses who were present and heard the words spoken *and, of course, that of the accused himself*, restricted to the issue as to whether the admissions made by the accused appeared to have been caused by any inducement held out to him by the revenue officer or officers. It seems to me that it was very difficult to decide this issue solely on the words spoken by the revenue officer and on the objection taken by defending counsel, *without having heard from the accused as to whether those words affected his mind in causing him to make any statement*. (Emphasis added.)
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In the light of the foregoing an accused is obliged to testify in the trial within a trial in order to effectively challenge the admissibility of his

cautioned statement. In this regard I refer to *Wong Kam-ming v R* [1979] 1 All ER 939 where Lord Edmund-Davies in delivering the advice of the Privy Council said at p 945: A

... As has already been observed, an accused seeking to challenge the admissibility of a confession may for all practical purposes be *obliged* to testify in the *voire dire* if his challenge is to have any chance of succeeding ... B

And to the speech of Lord Fraser in the House of Lords in *R v Brophy* [1981] 2 All ER 705 where his Lordship said at p 709:

... It is of the first importance for the administration of justice that an accused person should feel completely free to give evidence at the *voire dire* of any improper methods by which a confession or admission has been extracted from him, for he can almost never make an effective challenge of its admissibility without giving evidence himself. He is thus virtually compelled to give evidence in the *voire dire* ... C

Once the accused has discharged the evidential burden then it becomes the function of the court to determine the issue of voluntariness. In this regard reference may be made to *PP v Law Say Seck & Ors* [1971] 1 MLJ 199 where Sharma J said at p 200: D

... It is left to the court entirely to form its own opinion as to whether an inducement, threat or promise held out in any particular case was sufficient to lead the person to suppose that he would gain an advantage of a temporal nature. In doing so the mind of the person making the statement has to be judged rather than that of the person in authority. In scrutinizing a case of this kind the court has to perform a three-fold function: it has to determine the sufficiency of the inducement, threat or promise; it has to clothe itself with the mentality of the accused to see whether the grounds would appear to the accused reasonable for a supposition mentioned in s 24 of the Evidence Ordinance; lastly it has to judge as a court if the confession appears to have been caused in consequence of any inducement, threat or promise. E F

I shall now deal with the propriety of the admissibility of exh P5 against the background of the objections raised by learned counsel and the law that I have adverted to. G

The allegation that the statement was recorded under oppressive circumstances as the accused was not allowed to have his lunch

In England oppression as a ground of exclusion can be traced to the judgment of Lord Parker CJ in *Callis v Gunn* [1964] 1 QB 495. It was recognized as a separate head of exclusion pursuant to an amendment to the judges' rules in 1964 (see *Practice Note* [1964] 1 All ER 237). The material part of the amended rules reads as follows: H

... that it shall have been voluntary, in the sense that it has not been obtained from him by fear of prejudice or hope of advantage, exercised or held out by a person in authority, or by oppression. (Emphasis added.) I

It received statutory recognition in England as a separate and distinct head of exclusion by virtue of s 76 of the Police and Criminal Evidence Act 1984. Our laws, however, have not been amended to make provision for oppression to amount to a separate ground of exclusion. That of course does not mean that a statement recorded under such circumstances has to

- A be admitted in all cases. In *PP v Abdul Rahman bin Ibrahim* (Criminal Trial No 47(58)–15–86 High Court Penang, unreported) though Edgar Joseph Jr J (as he then was) was satisfied that the statement was recorded under oppressive circumstances his Lordship went on to hold that it was ‘technically admissible’ but proceeded to exclude it in accordance with the principles enunciated by the Privy Council in *Noor Mohamed v R* [1949] AC 182 as it had been obtained in an oppressive manner.
- B

Be that as it may, oppression first surfaced as an additional factor to render a confession involuntary in *Dato Mokhtar bin Hashim v PP* [1983] 2 MLJ 232 where Abdoolcader FJ said at p 273:

- C It appears from the decision in *DPP v Ping Lin* [1976] AC 574 that the classic test of the admissibility of an accused’s confession that the prosecution must establish beyond reasonable doubt that it was voluntary, in the sense that it was not obtained from him either by fear or prejudice or hope of advantage created by a person in authority, or by oppression, should be applied in a manner which is part objective part subjective.
- D Since then oppression as a ground of exclusion has gained acceptance in our criminal jurisprudence. See for instance *PP v Chong Boo See* [1988] 1 CLJ 679; *PP v Chan Choon Keong & Ors* [1989] 2 MLJ 427; *PP v Kamde bin Raspani* [1988] 3 MLJ 289; *PP v Lee Chee Meng* [1991] 1 MLJ 227; *PP v Veeran Kutty* [1990] 3 MLJ 498 and *Hasibullah bin Mohd Ghazali v PP* [1993] 3 MLJ 321.
- E

The meaning and scope of the word ‘oppression’ was explained by Faiza Thamby Chik JC (as he then was) in *PP v Chan Choon Keong & Ors* at pp 429–430:

- F The other point is whether the cautioned statement was obtained under oppressive circumstances. The relevant facts to be looked at and considered to show what are called ‘oppressive circumstances’ negating voluntariness are:
- (1) characteristics of the accused;
- (2) period of time during which he was questioned;
- (3) length of time during which he was in custody;
- (4) whether or not he was given opportunities of rest and refreshment.
- G

In *R v Priestly* (1966) 50 Cr App Rep 183 it was held that oppression means something which tends to sap and has sapped that free will which must exist before a confession is voluntary.

- H With regard to this objection raised by learned counsel the accused said:

Semasa statement diambil saya buat pengakuan. Saya buat pengakuan sebab mereka kata habis ambil statement baru boleh makan. Saya nak habiskan statement itu cepat-cepat sebab nak dapat makan.

- I The learned sessions court judge in his grounds of judgment said that the accused was arrested at 2.15pm and the statement was recorded soon after that (by 4.15pm). He then referred to the allegation raised by the accused in this regard and the denial of the prosecution witnesses of it. He proceeded to admit exh P5 without giving any reason. He ought to have given his reasons for rejecting the objection. In *Hong Leong Equipment Sdn Bhd v*

Liew Fook Chuan [1996] 1 MLJ 481 Gopal Sri Ram JCA stressed in his superbly reasoned judgment on the need for a public decision taker to give reasons for his decisions and said at p 538:

The imposition of a duty upon public decision takers to furnish reasons in cases affecting fundamental rights achieves the national aim. When a public decision taker gives reasons, he reveals his mind and exposes for curial scrutiny the basis for his decision.

In *Rohana bte Ariffin v Universiti Sains Malaysia* [1989] 1 MLJ 487 Edgar Joseph Jr J (as he then was) said that reasons for a decision are necessary in cases where there is a right of appeal since an appeal is merely a continuation of proceedings by way of rehearing and litigants as well as the appellant tribunal are entitled to know the reasons for the finding.

Notwithstanding what I have said, I was satisfied that the accused having raised the objection had not shown the manner in which it operated in his mind to cause him to give the statement in the discharge of the evidential burden on him. His testimony that he gave his statement quickly as he wanted to eat does not show how he would have gained any advantage or avoided any evil of a temporal nature in reference to the proceedings against him. After all the statement was recorded soon after his arrest. Accordingly, I rejected the objection raised.

The allegation that the recording officer had told, 'Saya kata ceritakan kepada saya hal yang sebenarnya berlaku'

The recording officer admitted in the trial within a trial that he said these words to the accused who then gave his statement.

In *PP v Liik Ching Kwong* [1988] 1 MLJ 398 Chong Siew Fai J (as he then was) said that the words 'you must tell the truth or else you will be charged' contained the element of threat. His Lordship referred to the case of *R v Smith* (1959) 43 Cr App Rep 121 where it was held that 'the court has been at pains to hold that even the most gentle ... threat ... will taint a confession'. An exhortation such as 'you had better tell the truth' and equivalent expressions have been regarded as having acquired a fixed meaning and held to import a threat (see *Selvadurai v PP* [1948-49] MLJ Supp 43; *PP v Naikan* [1961] MLJ 147; *Lim Kim Tjok v PP* [1978] 2 MLJ 94). Cases where expressions used were held to have an involuntary effect include *R v Thompson* (1783) 1 Leach 291 — 'Tell me where the things are and I will be favourable to you'; *R v Blackburn* (1952) 6 Cox CC 333 — 'A promise of pardon'; *R v Richards* (1832) 5 C & P 318 — 'If you do not tell me all about it, I will send for a constable'; *R v Thomas* (1836) 7 C & P 345 — 'It will be better for you to split and not suffer for all of them'; *R v Fennel* (1881) 7 QBD 147 — 'You had better tell the truth, it may be better for you'; *R v Kingston* (1830) 4 C & P 587 — 'You had better tell all you know'; *R v Barker* (1941) 28 Cr App Rep 52 — 'Offer of non-prosecution'; *R v Gillis* (1866) 11 Cox CC 69 — 'Immunity from prosecution'; *R v Luckhurst* (1853) 23 LJMC 18 — 'If you don't tell me, I will give you to the person in charge of the police till you do tell me'; *PP v Naikan* [1961] MLJ 147 — 'You had better tell the truth'. Cases where

A expressions used were not held to have an involuntary effect include *R v Court* (1836) 7 C & P 486 — ‘Be sure to tell the truth’; *R v Reeve and Hancock* (1872) LR 1 CCR 362 — ‘You had better, as good boys, tell the truth’; *R v Reason* (1872) 12 Cox CC 228 — ‘I must know more about it’; *R v Sleeman* (1853) 6 Cox CC 245 — ‘Don’t run your soul into more sin, but tell the truth.’

B In *DPP v Ping Lin* [1976] AC 574 it was held that the task of the court in determining voluntariness is to apply the spirit and intent of the confession rule, which is a question of fact in each case without being anchored to any particular words. Accordingly, Brennan J in speaking for the Federal Court of Australia in *Collins v R* (1980) 31 ALR 257 said that

C it is now debatable whether words which have been held to carry a fixed meaning of threat would now be given the same meaning and added at pp 309–310:

... in *Jarvis* (1867) LR 1 CCR 96, where it is said that if the person in authority said ‘You had better tell the truth’ or ‘it is better for you to tell the truth’, a subsequent confession would have been held inadmissible. Conversely, in *R v Coley* (1868) 10 Cox CC 536, the admonition, ‘if you don’t tell me you may get yourself into trouble and it will be worse for you’ was held to render the subsequent confession inadmissible. Whether these cases would be decided in the same way today may be open to debate (see *R v Bodsworth* (1968) NSWLR 132 at 129), especially in the light of Lord Morris’ speech in *DPP v Ping Lin* [1976] AC 574 but the principle of which they are illustration is undoubted. If a confessionalist, because of pressure or inducement of the relevant kind, believes that he will or may be better off by speaking (or conversely, that a refusal to speak will or may make it worse for him) a confession which is made in that belief is inadmissible.

F The debate that Brennan J spoke of in the *Collins* decision was fought in the forum of the Singapore High Court in *PP v Ramasamy* [1991] 1 MLJ 75 before Thean J and Chao Hick Pin JC on the effect of the words ‘you better tell the truth’ on a confessionalist. Chao Hick Tin JC in delivering the judgment of the court said at pp 77–78:

G There was also another complaint to the effect that during the recording of the s 122(5) statements, Inspector Lim had repeatedly warned the accused in Malay that he should tell the truth and not lies (*jangan cakap bohong, cakap betul-betul* or words to that effect). The accused also alleged that, when the second s 122(5) statement was recorded, Mrs Letchumi had said, ‘You better tell the truth’

H As regards the allegation that Inspector Lim told him in Malay to tell the truth, (*jangan cakap bohong, cakap betul-betul* or words to that effect), we find that even if that allegation be true, which is denied by Inspector Lim, we do not see how that expression as such could amount to a threat or inducement. The accused was not able to give details of the context in which this Malay expression was used which would show in that context it could amount to a threat or an inducement. In our view, the fact that a police officer reminds a witness that he should tell the truth and not tell lies cannot, in truth, constitute a threat or an inducement. But even if it could be construed to amount to a threat or inducement, we find that in the circumstances surrounding the giving of the statement that utterance did not really have any effect on the accused’s willingness to give the statement. The evidence shows that this utterance was not made prior to the giving of

I

a statement but in the course of the giving of the statement. The accused was not, in fact, induced by that utterance to think that by giving that statement he would gain any advantage of a temporal nature.

Again, as regards the allegation that Mrs Letchumi had told him 'you better tell the truth', Mrs Letchumi has, on re-examination, clarified that what she told him was that he should tell the truth. We are aware that some cases have held that utterances like, 'you better tell the truth' could amount to a threat or inducement. But we should make this observation. It seems clear to us that the interpreter uttered this advice in the course of recording the statement from the accused. We do not think that such words used in the circumstances of the present case are sufficient to suggest to the accused that he was going to gain any advantage by giving the statement. We held that this utterance does not render any of the three s 122(5) statements involuntary.

As Lord Salmon said in *DPP v Ping Lin* [1976] AC 574 at p 606:

Unfortunately, there are far too many reported cases concerning appeals against decisions allowing evidence of confessions or statements to go before a jury. A whole body of case law seems to have been conjured up out of what are essentially decisions on questions of fact. This has, I fear, led to a great deal of unnecessary confusion and complication in a branch of the law which is essentially clear and simple. I entirely agree with my noble and learned friend, Lord Kilbrandon, that in deciding whether an alleged confession or statement was free and voluntary and should be admitted in evidence, it is useless, just as it is in an accident case, to search for another case in which the facts seem to be similar and treat it as binding. Facts vary infinitely from case to case. The judge's task is to consider the evidence before him, to assess its implications and to decide the case on his view of that evidence in the light of the basic established principle.

Thus words uttered by a person in authority can be said to affect the voluntariness of a statement only if it can be shown that they had an effect on the willingness of the accused to give the statement. Only a confession made by an accused in the belief that he will or may be better off by speaking or that a refusal to speak will or may make it worse for him would not be admissible. In *Lau Kee Hoo v PP* [1984] 1 MLJ 110 there was evidence to show that the accused was induced to make a statement by being told that if he signed the statements he would be treated leniently and would not be tried in court. It was on this understanding that the accused signed the statement. Zakaria Yatim J (as he then was) ruled that the statement was not admissible.

In this appeal the accused did not go on record to show that the words complained of had any effect on him. There is nothing to show that as a result of the words used he was compelled or induced to make the statement. On the contrary he said, 'Polis tidak paksa saya untuk beri percakapan. Polis ada cakap perlahan'.

In the circumstances there is absolutely no merit in this objection.

Allegation that the recording officer was aware of the background of the case

With regard to this allegation the recording officer is on record as having said in the trial within a trial:

A Saya dimaklumkan oleh Azizah kes bersabit dengan kes rogol.

Under cross-examination he said:

Benar saya hanya tahu kes ini sepuluh minit sebelum rakam percakapan. Sebelum itu saya tidak tahu tentang kes ini.

B The evidence merely shows that the recording officer's knowledge of the case was limited to the fact that the case was a rape case. He came to know about it only ten minutes before recording the statement. In the words of Wan Yahya J (as he then was) in *PP v Yong Kong Hin* [1981] 2 CLJ 178 it is only those who have, inter alia, a detailed knowledge of the case who should refrain from recording the statement. There is also no evidence to show that the recording officer was aware of the background of the case in order to prevent him from recording the statement as suggested by Shaikh Daud J (as he then was) in *PP v Mohd Fuzi bin Wan Teh & Anor* [1989] 2 CLJ 652. In the circumstances the allegation raised by learned counsel is groundless.

D *The allegation that the statement was recorded as a result of cross-examination by the recording officer*

There is no evidence to suggest that the statement was recorded as a result of cross-examination. In this regard the recording officer said while under cross-examination:

E Benar percakapan sebagai naratif — semasa dia beri percakapan saya tidak soal dia.

The accused did not say anything on this issue when he gave evidence. On the other hand he said:

F Polis ambil masa lebih kurang 10–15 minit untuk rakam percakapan.

This indicates that the accused gave the statement in a narrative form as it appears. If it was recorded as a result of questioning, it would have taken a longer time. In the premises I was satisfied that the statement was not recorded as a result of cross-examination by the recording officer.

G Be that as it may, it is my view that it is not fatal to have a statement recorded as a result of cross-examination. Section 113(1) of the Criminal Procedure Code (FMS Cap 6) itself says that a statement is admissible, inter alia, whether it was made wholly or partly in answer to questions. In this regard useful reference may be made to *Datuk Haji Harun bin Haji Idris v PP* [1977] 2 MLJ 155 where Suffian LP posed this question at p 170:

Isn't there a conflict between s 112(ii) which says that the suspect is compelled to answer all questions except incriminating ones and s 15 (of the Prevention of Corruption Act which is similar to s 113) which says that a statement made before the arrest is admissible if made voluntarily?

I And answered it thus:

We would say not, because sub-s (1) clearly says that if the conditions set out therein are fulfilled, the statement is admissible 'whether or not wholly or partly in answer to questions' and because of s 29 of the Act which clearly provides that if a confession is otherwise admissible, that is, because the

court is satisfied that it was made voluntarily, it does not become inadmissible simply because it was 'made in answer to questions which he need not have answered, whatever may have been the form of those questions'.

In *Lee Weng Sang v PP* [1978] 1 MLJ 168 Chang Min Tat FJ said at p 172:

... It has now been settled by this court on 10 June 1977, in Federal Court Criminal Appeal No 19/1976 *Datuk Haji Harun bin Idris v PP* [1977] 2 MLJ 155 that notwithstanding this caution but because of the proviso, and having regard to s 29 of the Act, it does not become inadmissible merely because of the fact that it was made in answer to questions which he need not have answered.

In *Ong Hock & Anor v R* [1939] MLJ 232 McElwaine CJ said that cross-examination in recording a statement is not a form of threat or inducement unless it amounts to a bullying or badgering form tending to intimidate, of which there was no evidence in the appeal before me. Accordingly, it is my view that this objection has no foundation.

The father of the accused advised him to give the statement in the presence of police officers

On 6 February 1995 the accused was arrested by Detective Lance Corporal Sameon bin Ali (SP2 in the trial within a trial) ('Detective Sameon') and Detective Lance Corporal Md Rais bin Tukiman (SP5 in the trial within a trial) ('Detective Rais') and a police party at his house. He was taken to the police station in a car driven by his father. The two detectives mentioned, also followed them in the car. Detective Sameon sat at the back with the accused while Detective Rais sat on the front passenger seat.

While giving evidence in the trial within a trial the accused said that while they were travelling in his father's car to the police station:

Bapa saya kata mengakulah senang.

He then added:

Semasa statement diambil saya buat pengakuan Nasihat bapa saya juga bermain di kepala saya.

He was not cross-examined on this by the prosecution. His father in his evidence said:

Ada perbualan. Ada nasihat oleh anggota yang duduk di belakang. Saya juga ada cakap. Anggota di belakang suruh mengaku. Saya kata kalau mengaku, tidak kena susah-susah — lebih baik mengaku. Saya tidak berapa dengar orang belakang kita. Dia kata kalau mengaku lagi senang. Dua tiga kali dia kata.

Saya pun nasihatkan anak saya suruh mengaku — dengar cakap encik ini lebih senang.

Under cross-examination he was asked:

Sebenarnya nasihat yang kamu berikan itu sebenarnya dia tidak dengar dan kamu cerita ini untuk bantu dia bagi menolak kebolehterimaan percakapan beliau.

- A He did not agree to it. When Detective Sameon was cross-examined he said:

Saya kurang ingat apa yang berlaku di tempat tangkapan sehingga sampai di IPK.

- B Detective Sameon was in no position to rebut the allegation raised as he said that he could not remember what happened from the time of arrest till arrival at the police station. The prosecution ought to have recalled Detective Rais to rebut the allegation raised if in fact the prosecution was of the view that it was not true as he was also present in the car at the material time. In this regard reference may be made to *Tan Too Kia v PP* [1980] 2 MLJ 187 where the Federal Court held that as an Inspector was specifically identified at the trial as one of the persons who had assaulted the accused, he should have been called by the prosecution to contradict the accused. It cannot be argued that the failure of the accused to put this issue to the prosecution witnesses when they were testifying is fatal. In this regard Edgar Joseph Jr FCJ said in his usual inimitable style in *Alcontara a/l Ambross Anthony v PP* [1996] 1 MLJ 209 at p 218:

However, failure on the part of the defence to put its case, as aforesaid, can never, by itself, relieve the prosecution of its duty of establishing the charge against the accused beyond reasonable doubt.

- E At this stage, we would interpolate to remark — though we are digressing somewhat from the point concerning the onus of proof — that the judge went so far as to hold ‘that the defence by its failure so to put such questions to the prosecution witnesses *ought not to be allowed to raise such issues* at the defence stage’. In this, he was clearly wrong, since it is settled law that although a court may view with suspicion a defence which has not been put to the prosecution witnesses who might have personal knowledge of the points at issue, the court is still bound to consider the defence however weak and to acquit if not satisfied that the prosecution had discharged the burden of proof that rests on it.

- G The manner in which the accused’s father was cross-examined by the prosecution on this issue precludes me from viewing it with suspicion. It was put to him that in truth the advice he gave was not heard by the accused and that he mentioned it in order to have the cautioned statement rendered inadmissible. This presupposes the fact that the prosecution agreed that the accused person’s father actually gave the advice but that it was not heard by the accused. I was therefore satisfied that the accused person’s father did in fact say the words in question and that they played in his mind when he was giving the statement. The accused therefore made the statement partly as a result of what his father had told him.

- I However, it is settled law that in order to attract the prohibition contained in s 113 of the Criminal Procedure Code (FMS Cap 6) the threat, inducement or promise must have been made by a person in authority (see *Re Lee Kim Ching* [1974] 2 MLJ 44). Thus, the statement made by the accused would be involuntary only if his father can be considered as a person in authority. As a general rule, a person in authority is someone engaged in the arrest, detention, examination or prosecution of

the accused. The word 'examination' refers to interrogation by police officers, detention or security guards. As the two police personnel who were travelling in the car with the accused were the arresting officers they are clearly persons in authority. The accused's father made the statement to him in their presence. On the effect of an inducement made by someone not in authority in the presence of a person in authority, Finnemore J said in *R v Cleary* (1963) 48 Cr App Rep 116 at p 119: A B

It has also been decided that, though the inducement be made by a person not in authority, if in fact it is made in the presence of persons in authority, the position is the same as if they had made it themselves unless they take steps to dissent from it.

There is no evidence to suggest that the two police personnel took steps to dissent from what the accused person's father told him. On the contrary the evidence that I have reproduced earlier shows that they too made the same suggestion as that made by the accused person's father. In a situation such as this the person not in authority can be considered as the agent of the person in authority. To put it another way, by the presence of those in authority, the person not in authority is clothed with that authority. As a result, such a statement is suspect for the same reason that a statement made in response to an inducement offered by a person in authority would be (see *R v AB* (1986) 26 CCC (3d) 17). The circumstances in which the accused person's father uttered the words clothes him with the authority of a person in authority. His advice to the accused to admit so that matters will be 'lebih senang' was with the encouragement of the police personnel in the car. He said that he told his son to admit so that '.... tidak kena susah-susah — lebih baik mengaku'. The accused testified that what his father told him had played in his mind. That goes to explain the unusual speed at which the statement was given by the accused. It is therefore clear that he gave the statement as he thought that by doing so he would gain an advantage. The fact that the words used were advisory in nature do not weaken their effect as it has been held that even the most gentle threat will taint a confession. In the upshot, it is my view that the statement was not voluntarily made and it should therefore be excluded. C D E F G

Conclusion

In the final analysis the evidence of SP2 has to be considered on its own. It must not be overlooked that overtures by the accused person's parents to have him married to SP2 were rejected by her parents. SP1 played a dominant role in making the complaint against the accused. Under the circumstances it would be unsafe to act on SP2's evidence without any corroboration of which there is none. H

Accordingly, it is my view that the finding of guilt and the conviction of the accused by the learned sessions judge was wrong. I therefore set aside the order made by him and acquitted and discharged the accused. I
Appeal allowed.